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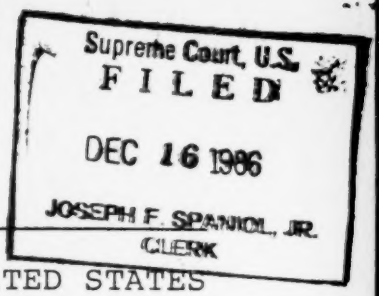

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,

Petitioner

v.

CHARLES E. LUTZ,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

LeRoy S. Zimmerman
Attorney General

Charles P. Mackin, Jr.
Chief Deputy Attorney General

Keith Welks
Chief Deputy Attorney General

Office of Attorney General
Criminal Law Division
1600 Strawberry Square
Harrisburg, PA 17120

(717) 787-2100

QUESTIONS PRESENTED

1. Whether outdoor business areas are "open fields" within the meaning of the Fourth Amendment?

2. Whether the warrantless search of Respondent's pasture violated the Fourth Amendment because governmental agents made physical entry into it?

3. Whether governmental agents could rely in good faith on the warrantless search provisions of the statute which heretofore had never been declared unconstitutional?

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PARTIES TO THE PROCEEDING

Petitioner is the Commonwealth of Pennsylvania.

Respondent is Charles E. Lutz.

OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania dated October 17, 1986, whose judgment herein is sought to be reviewed, is reported at Commonwealth of Pennsylvania v. Lutz, ____Pa.____, 516 A.2d 339 (1986) and reproduced at Appendix A. The prior decision of the Court of Common Pleas of Westmoreland County, Pennsylvania is unreported but may be found at Appendix B.

JURISDICTION

The Judgment of the Supreme Court of the Commonwealth of Pennsylvania was entered on October 17, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment of the United States Constitution, which provides as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, will not be violated, and no Warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Procedural History

This matter was commenced in the state courts by the filing on July 12, 1982 of a criminal complaint charging Respondent, Charles E. Lutz, with hindering or obstructing agents of the Department of Environmental Resources, 35 P.S. 6018.610(7); dumping or permitting the dumping of solid wastes without a permit, 35 P.S. 6018.610(1); and obstructing administration of law or other governmental function, 18 Pa.C.S. 5101. Preliminary hearing was held on September 14, 1982, and all matters were held for court. On November 12, 1982, Respondent filed his omnibus pre-trial motion, see, Appendix C, wherein he moved to suppress certain evidence and to dismiss the charge of hindering or obstructing agents of the Department of Environmental Resources (DER) and the

charge of obstructing administration of law or other governmental function. Respondent premised his motion on the grounds that an attempted search by DER employees violated the Fourth and Fourteenth Amendments to the Constitution. Hearing was held on Respondent's motion on February 28, 1983. On April 29, 1983, the Court of Common Pleas of Westmoreland County, Pennsylvania granted Respondent's motion to dismiss the above-mentioned charges. The court found the motion to suppress evidence moot, as no evidence had been seized. On May 24, 1983, your Petitioner, the Commonwealth of Pennsylvania, filed a timely notice of appeal with the Commonwealth Court of Pennsylvania. On May 17, 1985, that court, without taking any action, transferred the case to the Supreme Court of Pennsylvania pursuant to 42 Pa.C.S. 5103(a), which vests the

Supreme Court with exclusive jurisdiction in cases where a court of common pleas has ruled a state statute unconstitutional. 42 Pa.C.S. 722(7). On October 17, 1986, the Supreme Court of Pennsylvania entered a Judgment and Opinion from which your Petitioner seeks review herein.

B. The Evidence

The matter before this Court arose from an altercation which occurred on April 22, 1982 between Respondent Charles E. Lutz and two agents from the Pennsylvania Department of Environmental Resources, Randall Walton and Rita Coleman. Uncontradicted testimony reveals that: Walton and Coleman met with an informant who alleged that she had seen Respondent Lutz dumping sewage sludge on his land in Westmoreland

County. The meeting occurred on a dirt road along the eastern border of the Lutz property. The informant took Walton and Coleman to the edge of the Lutz property and pointed to the area where the dumping had occurred. According to Coleman, the property was not posted, nor was it fenced. At hearing on his pre-trial motion, Respondent Lutz testified to the contrary, and the trial court resolved the issue in Lutz's favor. Walton and Coleman crossed the property line; the informant remained behind. After entering the property via a dirt road to which the public had access, Coleman shortly smelled the odor of sewage sludge. Coleman and Walton proceeded to the exact area indicated by the informant and started to take samples. While taking a second sample, Coleman heard a truck approaching from

the opposite side of the field from which Coleman and Walton had entered. Respondent Lutz was driving the truck. Lutz approached the DER employees and inquired as to their identities. Both DER representatives identified themselves as such. Lutz wanted to know who had authorized them to be on his land and what purpose they had for being there. Walton answered that they were responding to a complaint, and, when Walton refused to identify the informant, Lutz became upset. Lutz admitted that sewage sludge from the City of Jeanette, Pennsylvania had been dumped; Walton responded that a permit was needed for such activity, while Lutz contended that no permit was necessary and that, further, he, Lutz, had a permit application pending with DER. Lutz, continuing to anger, stated that he wanted to take the DER agents'

samples and with that knocked a sample bottle from Walton's hand. Lutz then picked up the other bottle which was on the ground and threw it against his truck, in an apparent attempt to break the bottle. When the bottle did not break, Lutz picked up both bottles and threw them into the back of his pickup truck. Lutz stated that he had a notion to take Coleman's camera from her; Lutz then lunged at Coleman in an attempt to get the camera and wrestled with her. Coleman, taking evasive action, placed the camera behind her back, and, when the opportunity presented itself, Coleman attempted to toss the camera to Walton. The throw was short, the camera landing in front of Walton. Lutz jumped on Walton's back and attempted to get the camera. Lutz prevailed in the struggle. Lutz then attempted to open the back of the camera, and Walton then

indicated that no pictures had been taken. Lutz did not give the camera back and, at that time, asked that Walton and Coleman leave the property. The agents complied with his request.

In his testimony, Respondent Lutz contributed further to an understanding of the nature, characteristics, and use of the land where he confronted Coleman and Walton. Lutz explained that a road led from his house to the field, which was part of a working farm, and that he arrived at the scene of the eventual altercation in a truck. He admitted that the site of the alleged dumping was a field used to pasture white-faced cows and which was entered by a local gas company servicing wells located in the same field. He further testified that on one side of his property is a trailer park with approximately 150 trailers,

and children from said park are always coming into the fields and building cabins.

C. Rulings Below

The Court of Common Pleas of Westmoreland County, Pennsylvania determined that the warrantless entry provisions of the state Solid Waste Management Act, 35 P.S. 6018.608, did not meet constitutional requirements. Appendix B, page 78a. This was the first time any court had so ruled and indeed was the first time a court had been asked to do so. The Solid Waste Management Act has been in existence since 1980. The common pleas court also held that:

> Given Katz, the "open field" of Hester v. U.S., 265 U.S. 57 (1924) is of doubtful vitality.

Appendix B, page 81a, n. 3. The court of common pleas dismissed the charges

against the criminal defendant, Respondent herein.

The Commonwealth of Pennsylvania, your Petitioner, appealed, contending that the above statute is constitutionally sufficient, that the DER agents properly relied upon a legislatively enacted statute which was in effect at the time of the incident, that the field in question was an open field and the search was valid, Hester, supra; Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), and further that Respondent's resort to self-help was improper.

REASONS FOR GRANTING THE REVIEW

Certiorari should be granted to clarify the principles enunciated by this Court in Oliver v. United States,

466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), and in Dow Chemical Company v. United States, ___ U.S. ____, 106 S.Ct. 1819, ___ L.Ed.2d ___ (1986), as they apply to outdoor business activities. The Opinion of the Supreme Court of Pennsylvania interprets Dow as holding that outdoor business areas are not open fields, thereby narrowing drastically and sapping vitality from the open field doctrine, see, Hester v. United States, 265 U.S. 57 (1924), which was recently reaffirmed in Oliver, supra. According to the Supreme Court of Pennsylvania, the crucial occurrence in the instant matter was the fact that the governmental agents made physical entry onto Respondent's business property. Implicit in the Pennsylvania Supreme Courts' modification of Oliver and Dow is the establishment of a

"business curtilage exception" to the open fields doctrine. In Dow, at note 7, this Court specifically withheld ruling on the concept of "business curtilage" as enunciated in United States v. Swart, 679 F.2d 698 (7th Cir. 1982). However, the Supreme Court of Pennsylvania, undaunted by the aforementioned judicial restraint, applied Federal constitutional provisions (see, Appendix A, page 30a, n. 12, where the Pennsylvania Supreme Court specifically noted that Respondent was attacking the search only on Federal grounds, thus there being no independent state gounds upon which the Pennsylvania Supreme Court's decision can be founded) and ventured into an area which this Court had chosen not to enter. The Pennsylvania Supreme Court found that Dow required this result, notwithstanding

that this Court refrained from reaching this issue. By so doing, the Pennsylvania Supreme court proclaimed itself to be the final arbitor of a Federal question and has decided an important question of Federal law which had not been, but should be, settled by this Court.

Further, the decision of the Pennsylvania Supreme Court deciding this Federal question is in conflict with the decision of the 8th Circuit Court of Appeals in McDowell v. United States, 383 F.2d 599 (8th Cir. 1967), where, at page 603, the Court stated:

> [6] The contention of appellants that the fields were entitled to the protection of the Fourth Amendment as being within the curtilage of a commercial enterprise is without merit. Although the Supreme Court has recently expanded the Fourth Amendment protection of the business

> enterprise, See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed. 943 (1967), it has not expanded such protection beyond that which a private dwelling and the curtilage thereof is likelise [sic] entitled. Therefore, a search of open fields, without a search warrant, even if such fields are construed as part of a commercial enterprise, is not constitutionally "unreasonable."

To buttress its unique position, the Pennsylvania Supreme Court relied on only two decisions: United States v. Swart, 679 F.2d 698 (7th Cir. 1982), wherein a used car dealer's parking lot was held to be part of the "business curtilage" and was not subject to a warrantless search after business hours; and Allinder v. Ohio, 614 F.Supp. 282 (N.D. Ohio 1985), appeal pending, No. 85-3664 (6th Cir.), wherein the court held that the open fields doctrine cannot apply to warrantless administrative

searches of a beekeeping facility. Reliance on these cases is misplaced, as each is distinguishable from the matter sub judice.

Swart was decided prior to this Court's decisions in both Oliver and Dow, supra; thus, the 7th Circuit did not have the benefit of this Court's reasoning. The search in Swart occurred at night when the business was closed. Additionally, due to the fact that the cars which were the subject of the search were on a lot, entry to which had already been refused to the police, the court found that the owner had a reasonable expectation of privacy and that the cars may have been within the "business curtilage".

Allinder v. Ohio, supra, is distinguishable from the matter now before this Court. In Allinder, the Ohio Apiary Inspection Law was challenged.

The District Court found the law to be unconstitutional, as it purported to authorize non-consensual apiary inspections without a warrant or its equivalent, and permanently enjoined Ohio from conducting warrantless inspections pursuant to tne Apiary Inspection Law. The court found the facts in Allinder to be atypical, in that the commercial activity under question consisted of bee colonies in four counties. It distinguished Oliver from Allinder in that the criminal activity discovered in Oliver was unlike the commercial activity in Allinder, which was both legal and valuable to society. The court emphasized this distinction and relied on footnote 13 in Oliver, wherein this Court stated: "Certainly the framers did not intend that the 4th Amendment should shelter criminal activity wherever persons with criminal

intent choose to erect barriers and post no-trespassing signs." The Allinder court also found that the government inspection was sufficiently intrusive so that a warrant was required. The approved inspection technique required the opening of the bee colony, manipulation of the frames, location of the queen, and examination of the brood.

In the instant matter, nothing of a comparable nature occurred. Respondent's activities were not shielded from public view. He conducted his dumping of solid waste in an open field in plain view of someone beyond the border of his land, well beyond the curtilage of his home. Further, that the field in question was an open field cannot be debated based upon the record. The field was a pasture, part of Respondent's working farm.

Respondent used the pasture to pasture white-faced cows. It was located far enough from Respondent's house that he used a truck to drive to it when he confronted the DER employees. Respondent testified that individuals frequently came onto this land and were always building cabins thereon. Further, it should not be forgotten that Respondent testified that the gas company would enter the property to service gas wells located thereon.

Noteworthy also is the entry and sampling procedure used in this matter as contrasted with that condemned in Allinder. Here the DER agents sought only to fill two sample bottles by dipping them in the liquid material on Respondent's land. There was no "opening of the bee colony" and no "examination of the brood". This

minimal presence pales in comparison with the intrusion in Allinder and could not be construed as interfering with any legitimate commercial activity. No explanation can be offered for Respondent's violent reaction which turned a simple task into an explosive situation threatening all involved.

Since the property was an open field, the 4th Amendment does not apply to this situation. Oliver, supra. In an open field, one cannot have a reasonable expectation of privacy, because of the very nature of the field. However, the Supreme Court of Pennsylvania decided that physical entry was a crucial factor and, upon it, distinguished this matter from Dow, supra. The reasoning of the Pennsylvania Supreme Court is based upon this Court's language in Dow, 106 S.Ct. at 1825-26, wherein this Court stated:

> Admittedly, Dow's enclosed planned complex, like the area in Oliver, does not fall precisely within the "open fields" doctrine. The area at issue here can perhaps be seen as falling somewhere between "open fields" and curtilage, but lacking some of the critical characteristics of both. Dow's inner manufacturing areas are elaborately secured to ensure they are not open or exposed to the public and the ground. Any actual physical entry by EPA into any enclosed area would raise significantly different questions, because "the businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." See v. City of Seattle, supra, at 543. The narrow issue raised by Dow's claim of search and seizure, however, concerns aerial observation of a 2,000 acre outdoor manufacturing facility without physical entry.

Your Petitioner submits that the Pennsylvania Supreme Court wrongly

interpreted the above language to include all the fenced areas of Dow's plant, not simply the inner manufacturing areas. That no protection was meant to be accorded the outdoor areas is clear, since the sentence preceding the foregoing quote provides as follows:

> The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant.

Therefore, Petitioner contends, once it has been determined that the land in question is an open field, trespass or physical entry makes no matter. Oliver, supra.

The statute which was challenged in the lower court had never, prior to the lower court's ruling, been declared unconstitutional. Petitioner submits that the governmental agents had the

right to rely on the legislatively-enacted statute and that their reliance was in good faith. As such, the charges should not have been dismissed. See, Illinois v. Krull, 481 N.E.2d 703 (1985), cert. granted, 106 S.Ct. 1456 (May 1986).

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

LeRoy S. Zimmerman
Attorney General

By: Charles P. Mackin, Jr.
Charles P. Mackin, Jr.
Chief Deputy Attorney General

By: Keith Welks
Keith Welks
Chief Deputy Attorney General

Commonwealth of Pennsylvania
Office of Attorney General
Criminal Law Division
1600 Strawberry Square
Harrisburg, PA 17120
(717) 787-2100

Date: December 16, 1986

EDITOR'S NOTE

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86-997

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,

Petitioner

v.

CHARLES E. LUTZ,

Respondent

APPENDICES TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

LeRoy S. Zimmerman
Attorney General

Charles P. Mackin, Jr.
Chief Deputy Attorney General

Keith Welks
Chief Deputy Attorney General

Office of Attorney General
Criminal Law Division
1600 Strawberry Square
Harrisburg, PA 17120

(717) 787-2100

app

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IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA
Appellant

v.

CHARLES E. LUTZ,
Appellee

APPEAL DOCKET, 1985
APPEAL FROM ORDER OF COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, CRIMINAL DIVISION, DATED APRIL 29, 1983, AT NO. 1222 C OF 1982, TRANSFERRED BY COMMONWEALTH COURT ON MAY 17, 1985 FROM NO. 1447 C.D. 1983

ARGUED: March 7, 1986

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, be, and the same is, hereby AFFIRMED.

/s/ Irma T. Gardner
Irma T. Gardner
Deputy Prothonotary

Dated: October 17, 1986

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

NO. 59 WESTERN DISTRICT
APPEAL DOCKET, 1985

APPEAL FROM ORDER OF COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, CRIMINAL DIVISION, DATED APRIL 29, 1983, AT NO. 1222 C OF 1982, TRANSFERRED BY COMMONWEALTH COURT ON MAY 17, 1985 FROM NO. 1447 C.D. 1983

ARGUED: March 7, 1986

COMMONWEALTH OF PENNSYLVANIA
Appellant

v.

CHARLES E. LUTZ,
Appellee

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

HUTCHINSON, J. FILED: OCTOBER 17, 1986

The Commonwealth directly appeals a Westmoreland County Common Pleas' order dismissing several criminal charges filed against appellee. He was charged with violating Section 610(7) of the Solid Waste Management Act, Act of

July 7, 1980, P.L. 380, No. 97, 35 P.S. §§ 6018.101-6018.1003 (Supp. 1985) ("Act"), 35 P.S. § 6018.610(7), obstructing a Department employee,[1] and with obstruction of justice under 18 Pa.C.S. § 5101.

In a pre-trial motion, appellee challenged the validity of the charges on constitutional grounds. He claimed that the warrantless search provisions of the Act were unconstitutional.[2] Common Pleas agreed and dismissed those

---

[1]Appellee was also charged with violating Section 610(1) of the Act, 35 P.S. § 6018.610(1), dumping solid waste without a permit. That charge is not before us.

[2]The Department claims that the constitutionality of the statute allowing entry for inspection was not challenged and therefore is waived. Although appellee's pre-trial motion (footnote continued on next page)

those charges because it believed appellee was entitled to prevent an unconstitutional search.[3] The Commonwealth appealed to Commonwealth Court. That court transferred the case to us pursuant to 42 Pa.C.S. § 5103(a) because we have exclusive jurisdiction of cases where a court of common pleas has ruled a state statute unconstitutional. 42 Pa.C.S. § 722(7).

---

[2](continued) only raised general constitutional violations, it is clear on this record that the Department relied solely on the statutory right of entry and that it knew of the grounds for appellee's contention. Indeed, the Departments response to the motion specifically cited the statute as authority for its action. Thus, it cannot claim the issue was waived.

[3]The Department did not file any charges based on appellee's use of force in preventing the search.

On analysis of the statute and relevant case law, we conclude that the warrantless inspection provisions of the Act, in the current absence of a regulation defining the circumstances under which such inspections of non-hazardous waste will be conducted, violates the Fourth Amendment of the United States Constitution. We also believe that the "open fields" doctrine, developed under the Fourth Amendment, does not apply in this case. The lands here were used for commercial activites which, because of a strong public interest, requires extensive and pervasive regulation and the attempted search involved an actual physical intrusion. See Dow Chemical Co. v. United States, U.S. ____, 106 S.Ct. 1819 (1986). The order of Common Pleas is affirmed.

Appellee has had a history of dealings with the Department. In early 1982, he was in the process of attempting to renew several expired permits to store sewage on his property.[4]

In January of that year, appellee took some oily waste from a spill site

---

[4]Appellee argues that because he is not licensed to store solid waste under this Act he is not subject to the inspection provisions, and therefore all searches must be based on warrants issued on probable cause. We believe that this argument fails. Although the United States Supreme Court at one time stated that entry into a regulated business supported the warrantless searches on an implied consent theory, United States v. Biswell, 406 U.S. 311, 316 (1972), it has since stated that the existence and pervasive nature of the regulations, not consent, give the notice required. Donovan v. Dewey, 452 U.S. 594, 603 (1981). See W. LaFave, Search and Seizure, § 10.2, n. 52.3 (Supp. 1986). On the facts of this case, this argument would not succeed in any event. Appellee stated that he was attempting to obtain a permit under the Act. Thus, he cannot claim that he was unaware of the Act's provisions.

in Westmoreland County. In that same month, the Department attempted to search his property to determine whether that material had been illegally dumped on it. Appellee refused to admit them. The Department then contacted appellee's attorney to arrange a consensual search of the property. It was agreed that the Department's agents would identify themselves to the Lutz family before actually searching the property. Appellee's attorney testified at the hearing in this case that he believed that this procedure would be followed whenever the Department wished to search his client's property The Department's attorney stated that the procedure was intended only for the search in January. The Department did in fact follow the procedure at that time.

On April 22, 1982, two Department agents attempted to conduct a search of

appellee's property without either obtaining a search warrant or attempting to contact appellee befor conducting the search. The agents had been told by an anonymous informant that solid waste was on appellee's property Appellee refused to allow the agents to carry out their search, confiscated a camera and empty sample bottles and ordered the agents off his property. The agents complied with his request. After obtaining his permission, the Department was able to conduct its search the next day. However, the Department filed the charges that are before us based on appellee's initial refusal to allow a search and the seizure of its camera and supplies.

The Department, as appellant, claims that the Solid Waste Management Act allows it to conduct warrantless

searches for all solid wastes. Section 608 of the Act provides:

> § 6018.608. Production of materials; record-keeping requirements; rights of entry
>
> The department and its agents and employees shall:
>
> (1) Have access to, and require the production of, books and papers, documents, and physical evidence pertinent to any matter under investigation.
>
> (2) Require any person or municipality engaged in the storage, transportation, processing, treatment or disposal of any solid waste to establish and maintain such records and make such reports and furnish such information as the department may prescribe.
>
> (3) Enter any building, property, premises or place where solid waste is generated, stored, processed, treated or disposed of for the purposes of making such investigation or inspection as may be necessary to ascertain the compliance or noncompliance by any person

> or municipality with the provisions of this act and the rules or regulations promulgated hereunder. In connection with such inspection or investigation, samples may be taken of any solid, semi-solid, liquid or contained gaseous material for analysis.

35 P.S. § 6018.608 (Supp. 1985). Appellee first argues that this section does not authorize the Department to conduct warrantless searches. We disagree. We conclude that the Act, read as a whole, does authorize such conduct.

The stated legislative policy of the Act is to "provide a flexible and effective means to implement and enforce the provisions of this act." Section 102(5), 35 P.S. § 6018.102(5) (Supp. 1985). The Department is given authority to "do any and all other acts and things not inconsistent with any provisions of this act, which it may deem necessary or proper for the effective enforcement of this act . . . ."Section

104(13), 35 P.S. § 6018.104(13) (Supp. 1985). Thus, it is designed to give the broadest possible powers to the Department to control waste management in this Commonwealth.

Section 608, quoted above, empowers the Department to have materials produced and records kept and affords it a right of entry[5] where solid waste is generated or otherwise managed. This section provides that the Department shall enter such facilities. Shall is ordinarily construed as an imperative. Commonwealth v. Garland, 393 Pa. 45,

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[5]Clear designation of the Department's power as a "right of entry" is stated in the title of Section 608. This title may be used to aid in statutory construction. 1 Pa.C.S. § 1924.

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142 A.2d 14 (1958). Thus, while Section 608 is silent on the question of a warrant, we believe that it was the intent of the legislature to authorize warrantless searches pursuant to Section 608(3).[6]

Furthermore, Section 610, which proscribes certain conduct, provides in pertinent part:

---

[6]Several federal statutes have similar language on the right of entry. See, e.g., Internal Revenue Code, 26 U.S.C. § 5146; Gun Control Act, 18 U.S.C. § 923(g); Occupational Safety and Health Act, 29 U.S.C. § 657. This language has been held to authorize warrantless searches. See Colonnade Catering v. United States, 397 U.S. 72 (1970); Biswell, supra; Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). These cases are discussed at slip op. at 10-11.

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> It shall be unlawful for any person or municipality to:
>
> (7) Refuse, hinder, obstruct, delay, or threaten any agent or employee of the department in the course of performance of any duty under this act, including, but not limited to, entry and inspection under any circumstances.

35 P.S. § 6018.610(7) (Supp. 1985).[7] This existence of criminal, as opposed to civil, penalties underscores the intention of the legislature to permit warrantless searches by the Department in enforcing the Act's provisions.

Against this construction appellee argues that the Act provides a procedure whereby the Department may obtain a search warrant. Section 609, 35 P.S. § 6018.609 (Supp. 1985). That section

---

[7]Appellee was cited for violation of this section.

permits the Department to obtain a search warrant on three grounds: the search is part of a general administrative plan to determine compliance with the Act; there is reason to believe there is a violation of the Act; or the Department has been refused entry to the site in question. Id These grounds meet the lesser standard of probable cause allowed for administrative search warrants. See Camara v. Municipal Court, 387 U.S. 523 (1967).

Thus, the Department may obtain a warrant if it anticipates a landowner's refusal of a warrantless search. It also has the authority to obtain a warrant, without a full court hearing, after such a refusal. Section 609 gives the Department the flexibility it needs without requiring the issuance of a warrant in all cases. Nonetheless, although the Act authorizes warrantless

searches by the Department, mere statutory authorization of this conduct is not enough Any such search is still subject to constitutional limitations.

The United States Supreme Court has analyzed the constitutionality of similar statutes allowing administrative searches of commercial operations under the federal constitution. In 1967, that Court determined that Fourth Amendment protections do indeed apply to commercial property. See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, supra. On several occasions it has held that certain warrantless administrative searches without probable cause may be constitutional:

> The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such

> property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections.

Donovan v. Dewey, 452 U.S. 594, 598-99 (1981). The Court summarized the cases on this issue by stating:

> These decisions make clear that a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.

Id. at 600. By this analysis, the Court in Dewey upheld a warrantless inspection under the Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-962. In doing so, the Court seemingly relied on the

pervasive regulation of mining, the regularity of the inspections and the strong federal interest in protecting persons employed in the mining industry.

In Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), the Court also held that, because of its history of pervasive regulation, the alcoholic beverage industry was subject to warrantless searches to promote federal interests in the control of the sale of alcohol. Likewise, in United States v. Biswell, 406 U.S. 311 (1972), the Court held that warrantless searches under the Gun Control Act of 1968, 18 U.S.C. §§ 921-929, were justified because there was a comprehensive inspection scheme, a strong federal interest in gun control, and only a limited threat to the privacy of the gun dealer.

However, in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), the Court invalidated a warrantless inspection under Section 8(a) of the Occupational Safety and Health Act, 29 U.S.C. § 657(a). Because the OSHA provisions covered all businesses engaged in interstate commerce and there were no standards governing the searches, the Court held that there was no reasonable expectation that the property would actually be subjected to warrantless searches.

In each of these cases, the United States Supreme Court balanced the need for warrantless regulatory searches against the business owner's expectation of privacy. In so doing, it looked at four factors: first, whether the business operator is on notice that he is engaged in activity which may subject him to warrantless searches; second,

whether the regulation of the industry is pervasive and regular, considering the history of the regulatory scheme as a factor in this determination; third, whether there is a strong governmental interest in the search; and fourth, whether there are reasonable legislative or administrative standards governing the search.[8]

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[8]The record shows that the Solid Waste Management Act meets the first three requirements. It contains specific definitions of what is and what is not subject to its provisions. See Section 103, 35 P.S. § 6018.103; see also 25 Pa. Code §§ 75.1-75.450. The second is also satisfied. The regulation of the industry is pervasive, with tight restrictions on the handling of solid and hazardous waste. The potential health hazards of improper waste management provide the strong governmental interest that is also needed to justify a warrantless inspection scheme. The Act contains the following finding in its declaration of policy: (footnote continued on next page)

We believe that the fourth requirement is not satisfied on the record before us. The Dewey Court, in analyzing the provisions of the Mine Safety and Health Act, noted that it provided inspections at least four times per year for underground mining, and at least twice a year for surface mining operations.

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8 (continued)[I]mproper and inadequate solid waste practices create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare . . . .

Section 102, 35 P.S. § 6018.102. In addition, Article I, Section 27 of the Pennsylvania Constitution provides that there is a right to clean air and pure water, thus giving constitutional implications to environmental protection measures.

The Solid Waste Management Act does not set up any specific schedule of inspections. The Department is merely given the power to conduct inspections at any reasonable time. Thus, there is no legislative determination of either the frequency of searches on commercial property used to store solid waste or the circumstances which will result in a warrantless search. It appears that the legislature has left such definition to the Department, the regulatory agency. Section 104(7), 35 P.S. § 6018.104(7).

However, the Department has failed to properly and publicly set forth any further definition. The regulations adopted by the Department and published in the Pennsylvania Code, 25 Pa. Code § 75.1-75.450, do not provide any sort of timetable or schedule of regular

inspections. There is no evidence of record to indicate that the particular search in this case was in fact part of a regular inspection nor any public declaration by the Department of the administrative standards which will trigger an ad hoc inspection.[9]

The trial court in the case before us held that Dewey, supra, required legislative or administrative periodicity

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[9]In its brief, the Department states that its policy is to inspect monthly. It also cites federal authority to show that policy can be considered in this analysis. See United States v. Kaiyo Maru No. 53, 699 F.2d 989 (9th Cir. 1983). We cannot consider this policy, however, since it was never introduced at the hearing on appellee's pre-trial motion and has not been placed on the record anywhere beyond its mention in the Department's brief. See also Section 1208 of the Act of July 31, 1968, P.L. 769, No. 240, 45 P.S. § 1208.

for searches in all cases. We do not believe this is an accurate reading of Dewey.[10] In Colonnade Catering, supra, Congress gave extremely broad powers to the Treasury Department to

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[10]The Dewey Court's emphasis on the congressional requirement that mine inspections take place at regular intervals was noted in the process of distinguishing that case from Marshall v. Barlow's, Inc., supra. In Barlow's, the Court invalidated OSHA warrantless searches because the OSHA statute allowed searches of all worksites engaged in interstate commerce. This did not provide reasonable notice to previously unregulated workplaces that such searches would be conducted. The Dewey Court, also considering legislation designed to protect on-site employees, upheld warrantless searches under a statute which set a regular schedule for them. It seems to us the congressionally-defined schedule, coupled with the narrower scope of the regulations, were crucial factors in distinguishing Barlow's prohibition on warrantless searches under OSHA and upholding the constitutionality of such searches under the Mine Health and Safety Act.

conduct searches for liquor violations. The United States Supreme Court held that the statute's prohibition of forcible entry sufficiently limited this broad power and saved the warrantless search, despite the presence of civil penalties for refusal to allow it, because of the long history of close supervision of the liquor industry. Our Act similarly prohibits forceful entry and has both civil and criminal penalties for refusing to allow inspection, § 610(7). Refusal itself provides grounds for issuing a warrant, § 609(3).

In industries where the governmental interest is special, either because of a long history of pervasive regulation, as in the case of alcohol, Colonnade Catering, or firearms, Biswell, or because of the nature of the

risks involved, as in the nuclear power industry, see Dewey, supra, 452 U.S. at 606 (quoted below), warrantless searches with minimal restrictions are permitted because operators who engage in such businesses are on notice that they will be subject to them. Thus, the operators' expectation of privacy is reduced and such searches are constitutional because they must reasonably be expected by the persons in those businesses.

Hazardous waste poses severe public health risks not only to those working in the industry but to the public at large. It is the type of business that can be reasonably subjected to warrantless searches with minimal definition. This is so, even though the special dangers of hazardous waste and its consequent separation from other solid waste for special regulatory

treatment is recent. As the Court said in Dewey:

> Under [the view that there must be a longstanding regulatory scheme in all cases], new or emerging industries, including ones such as the nuclear power industry that pose enormous potential safety and health problems could never be subject to warrantless searches even under the most carefully structured inspection program simply because of the recent vintage of regulation.

452 U.S. at 606. By definition, the interests of the public at large must predominate when hazardous waste is involved. Our statute categorizes as hazardous that waste which because of its quantity, concentration, or physical, chemical, or infectious characteristics may:

> (1) cause or significantly contribute to an increase in mortality or an increase in morbidity in either an individual or the total population; or
>
> (2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed.

Section 103, 35 P.S. § 6018.103. The risks these substances pose to the public, coupled with the commercial operator's knowledge of those risks, justify warrantless searches of sites where they are kept. The nature of the business and its narrow definition justify the search as indicated when Dewey is compared to Barlow's. In short, we conclude that such searches are a reasonable means of ameliorating the great risk these materials pose to the general public.

We do not believe the same is true with respect to non-hazardous solid waste, the material involved in this case. The Act covers all waste, including municipal, residual or hazardous wastes. It specifically defines agricultural waste, food processing waste, hazardous waste (discussed, supra), municipal waste, and residual waste. While we recognize an important public interest in controlling non-hazardous waste, it does not rise to the same level of concern as hazardous waste. Although certainly unpleasant at times, ordinary solid waste does not pose the same danger to public health as hazardous waste. Since the public interest is less vitally affected and the industry itself has fewer of the special characteristics that would put an operator on notice of random

regulatory searches, we believe that warrantless searches for ordinary solid waste cannot withstand constitutional scrutiny absent proper adoption by the Department of a flexible inspection schedule or a reasonable definition of the circumstances under which such searches will be conducted. See Dewey, supra.[11]

Alternately, the Department argues that the search should be upheld under the "open fields" exception to the

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[11]We note that the Act contains a severability clause. Section 1002, 35 P.S. § 6018.1002. The distinction between hazardous waste and other forms of solid waste is a distinction already present in the Act. There is a separate article dealing with hazardous waste, and Section 606 contains separate criminal penalties for those violating the hazardous waste portions of the Act.

Fourth Amendment.[12] That exception, first set out by the United States Supreme Court in Hester v. United States, 265 U.S. 57 (1924), and recently reaffirmed in Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), states that there can be no reasonable expectation of privacy in areas beyond the traditional curtilage surrounding one's home.

The United States Supreme Court has just addressed a question similar to that presented here: the applicability of the open fields doctrine to outdoor commercial property. In Dow Chemical Co. v. United States, ___ U.S. ___ 106 S.Ct. 1819 (1986), the Court analyzed

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[12]Appellee did not attack the search in this case under Article I, Section 8 of the Pennsylvania Constitution.

whether the Environmental Protection Agency could lawfully take aerial photographs of Dow's chemical processing plant. That plant, because of the size of its facility and the dangers of conducting the activity in closed spaces, left much of its equipment exposed to the elements. The plant was subject to extremely stringent security precautions to protect its trade secrets.

The Court held that taking aerial photographs of the plant did not violate the Fourth Amendment because the pictures were of items that could ordinarily be seen in the air. The Court did note the limited nature of its holding:

> Admittedly, Dow's enclosed plant complex, like the area in Oliver, does not fall precisely within the "open

> fields" doctrine. The area at issue here can perhaps be seen as falling somewhere between "open fields" and curtilage, but lacking some of the critical characteristics of both. Dow's inner manufacturing areas are elaborately secured to ensure they are not open or exposed to the public from the ground. Any actual physical entry by EPA into any enclosed area would raise significantly different questions, because "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." See v. City of Seattle, supra, at 543. The narrow issue raised by Dow's claim of search and seizure, however, concerns aerial observation of a 2,000-acre outdoor manufacturing facility without physical entry.

106 S.Ct. at 1825-26 (footnotes omitted). The Court also noted, in limiting the application of this case, that it was not addressing any question of general "business curtilage." 106 S.Ct. at 1827 n. 7.

We believe that the case before us is distinguishable from Dow. The Department attempted actual entry onto private land that was not visible from any public area. Dow's holding is expressly limited to aerial searches. The implication of the above-quoted language is that physical entry into the enclosed plant complex, even the outdoor portions of that area, would not be permissible because that area is not an open field.

The conclusion that outdoor business areas are not open fields is consistent with the purpose of the open fields doctrine. The basic premise of the open fields doctrine, that there can be no reasonable expectation of privacy in an open field, is at times incompatible with the idea that a business owner has a reasonable expectation of

privacy in his property. This is especially true where the business must, by its nature, be conducted outside. See, e.g., United States v. Swart, 679 F.2d 698 (7th Cir. 1982) (used car dealer's parking lot was part of the "business curtilage" and was not subject to warrantless search after business hours); Allinder v. Ohio, 614 F.Supp. 282 (N.D. Ohio 1985), appeal pending, No. 85-3664 (6th Cir.) (open fields doctrine cannot apply to warrantless administrative searches of beekeeping facility.

Thus, because the Court in Oliver, supra, required a balancing of governmental intrusion against the societal values protected by the Fourth Amendment, 104 S.Ct. at 1743, we believe that in this case the legitimate expectation of privacy, protected by the provisions

of the Act and the decisions of the United States Supreme Court discussed in the first portion of this opinion, renders the open fields doctrine inapplicable to this property. The Department cannot rely on it to justify its search of appellee's property. Because we can find no constitutional exception to the requirement of a warrant in this case, we would affirm the dismissal of the charges.

The order of the Court of Common Pleas of Westmoreland County is affirmed.

Mr. Justice Flaherty joins in the opinion announcing the judgment of the Court and files a concurring opinion.

Mr. Chief Justice Nix files a concurring opinion.

Mr. Justice Larsen files a dissenting opinion in which Mr. Justice McDermott and Mr. Justice Papadakos join.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA
Appellant

v.

CHARLES E. LUTZ,
Appellee

Appeal From Order Of Court Of Common Pleas of Westmoreland County, Criminal Division, Dated April 29, 1983, at No. 1222 C of 1982, Transferred by Commonwealth Court on May 17, 1985 from No. 1447 C.D. 1983

ARGUED: March 7, 1986

CONCURRING OPINION

MR. JUSTICE FLAHERTY
FILED: OCTOBER 17, 1986

I join the opinion announcing the judgment of the Court authored by Mr. Justice Hutchinson, although I am compelled to express the view that the discussion regarding hazardous waste is unnecessary and goes beyond the issue in this case.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA
Appellant

v.

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Appeal From Order Of Court Of Common Pleas of Westmoreland County, Criminal Division, Dated April 29, 1983, at No. 1222 C of 1982, Transferred by Commonwealth Court on May 17, 1985 from No. 1447 C.D. 1983

ARGUED: March 7, 1986

CONCURRING OPINION

NIX, C.J. FILED: OCTOBER 17, 1986

The appellant, the court below and my brethren on this Court have focused upon the constitutionality of the "warrantless search provisions" provided for in the Enforcement and Remedies sections

of Article VI of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, No. 97, 35 P.S. §§ 6018.601-6018.617 (Supp. 1986). Yet nowhere in those sections is there an express grant of a warrantless right of entry. Thus the constitutional issue arises from a statutory interpretation and not from the express dictates of the General Assembly.

It should not be necessary to remind the members of this Court that it is a cardinal rule of statutory construction that it be assumed that the legislature did not intend to violate the Constitutions of the United States and of this Commonwealth. 1 Pa C.S. §1922 (3); Consumer Party of Pennsylvania v. Commonwealth, ___ Pa. ___, 507 A.2d 323 (1986); Hospital Utilization Project v. Commonwealth, ___

Pa. ___, 487 A.2d 306 (1985); Krenzelak v. Krenzelak, 503 Pa. 373, 469 A.2d 987 (1983); Wajert v. State Ethic Commission, 491 Pa. 255, 420 A.2d 439 (1980); Triumph Hosiery Mills v. Commonwealth, 469 Pa. 92, 364 A.2d 919 (1976); Devlin v. Osser, 434 Pa. 408, 254 A.2d 303 (1969); Philadelphia v. Dupuy, 431 Pa. 276, 244 A.2d 741 (1968); Bentman v. Seventh Ward Democratic Committee, 421 Pa. 188, 218 A.2d 261 (1966); Milk Control Commission v. Battista, 413 Pa. 652, 198 A.2d 840 (1964); Commonwealth v. McCoy, 405 Pa. 23, 172 A.2d 795 (1961); Baker v. Retirement Board of Allegheny County, 374 Pa. 165, 97 A.2d 231 (1953); Spigelmire v. North Braddock School District, 352 Pa. 504, 43 A.2d 229 (1945). This is particularly true where one must strain to reach the unconstitutional meaning, Consumer Party of

Pennsylvania v. Commonwealth, supra; Philadelphia Housing Authority v. Commonwealth, Pennsylvania Labor Relations Board, ___ Pa.___, 499 A.2d 294 (1985); Commonwealth v. Stanley, 498 Pa. 326, 446 A.2d 583 (1982); Commonwealth v. College, 497 Pa. 71, 439 A.2d 107 (1981); In Re: Estate of Baker, 496 Pa. 577, 437 A.2d 1191 (1981); Commonwealth v. Mumma, 489 Pa. 547, 414 A.2d 1026 (1980); Stegmaier Estate, 424 Pa. 4, 225 A.2d 566 (1967); Davis v. Sulcowe, 416 Pa. 138, 205 A.2d 89 (1964), which in my judgment is the case here.

Section 608(3), the subsection said to authorize a "warrantless entry," simply provides that the Department and its agents and employees shall:

> (3) Enter any building, property, premises or place where solid waste is generated, stored, processed, treated or disposed of for

> the purposes of making such investigation or inspection as may be necessary to ascertain the compliance or noncompliance by any person or municipality with the provisions of this act and the rules or regulations promulgated hereunder. In connection with such inspection or investigation, samples may be taken of any solid, semisolid, liquid or contained gaseous material for analysis. If any analysis is made of such samples, a copy of the results of the analysis shall be furnished within five business days to the person having apparent authority over the building, property, premises or place.

35 P.S. § 6018.608(3) (Supp. 1986). This subsection merely defines the Department's obligations to perform on-site investigations and inspections. It does not authorize any entry that would be violative of existing law. This is clearly evident because the very next paragraph, section 609, provides for an administrative search warrant,(1) which clearly would satisfy constitu-

tional standards, for the carrying out of the responsibilities imposed under subsection 608(3). The obvious question that is raised by an interpretation that would read section 608(3) as providing a blanket authority for warrantless investigations and inspections is what then would be the need for Section 609.[1]

Section 609 provides:

> An agent or employee of the department may apply for a search warrant to any Commonwealth official

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[1]that the inspection, examination, test, or sampling is pursuant to a general administrative plan to determine compliance with this act;

(2) that the agent or employee has reason to believe that a violation of this act has occurred or may occur; or

(3) that the agent or employee has been refused access to the property, building, premise, place, book, record or physical evidence, or has been prevented from conducting test or taking of samples.

35 P.S. § 6018.609 (Supp. 1986).

> authorized to issue a search warrant for the purposes of inspection or examining any property, building, premise, place, book, record or other physical evidence of conducting tests, or of taking samples of any solid waste. Such warrant shall be issued upon probable cause. It shall be sufficient probable cause to show any of the following:

It is also argued that subsection 610(7) is conclusive proof that subsection 608(3) was intended to authorize a warrantless entry. Section 610(7) provides:

> It shall be unlawful for any person or municipality to:
>
> > (7) Refuse, hinder, obstruct, delay, or threaten any agent or employee of the department in the course of performance of any duty under this act, including, but not limited

> to entry and inspection under any circumstances.

35 P.S. § 6018.610(7) (Supp. 1986). To argue that this provision embraces any entry, whether lawful or not, would again violate fundamental concepts of statutory construction. The obvious meaning of the use of the word "entry" in the last clause of the above quoted subsection is an "entry" permitted under the provisions of the Act. That would therefore require the entry to be either consented to by the landowner or pursuant to a warrant secured under section 609.

I therefore agree with appellee that subsection 608(3) did not implicitly provide for a warrantless entry and since the entry was unauthorized the criminal charges against appellant were

properly dismissed. For that reason I would affirm the order of the court below.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA
Appellant

v.

CHARLES E. LUTZ,
Appellee

Appeal From Order Of Court Of Common Pleas of Westmoreland County, Criminal Division, Dated April 29, 1983, at No. 1222 C of 1982, Transferred by Commonwealth Court on May 17, 1985 from No. 1447 C.D. 1983

ARGUED: March 7, 1986

DISSENTING OPINION

JUSTICE ROLF LARSEN
FILED: OCTOBER 17, 1986

In my opinion, the warrantless inspection provisions of the Solid Waste Management Act (the "Act"), section 608, 35 P.S. § 6018.608 (Supp. 1985), are clearly valid under the "Colonnade-

Biswell exception"[1] to the warrant requirement of the Fourth Amendment as that exception was explained by the United States Supreme Court in Donovan v. Dewey, 452 U.S. 594, 601 (1981). Accordingly, I dissent.

In Donovan v. Dewey, the United States Supreme Court stated:

> [U]nlike searches of private homes, which generally must be conducted pursuant to a warrant in order to be reasonable under the Fourth Amendment, legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment.....

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[1]Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (upholding validity of warrantless inspections of businesses in alcoholic beverage industry); United States v. Biswell, 406 U.S. 311 (1972) (upholding validity of warrantless inspections authorized by Gun Control Act).

The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections. ...

The interest of the owner of commercial property is not one in being free from any inspections. Congress has broad authority to regulate commercial enterprises engaged in or affecting interstate commerce, and an inspection program may in some cases be a necessary component of federal regulation.

These decisions make clear that a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a

> regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.

452 U.S. at 598-99, 601 (citations omitted; emphasis added).

The majority seems to hold that the warrantless inspections authorized by the Act are almost valid under the balancing test enunciated by Dewey, and would be valid if the authorization were limited to warrantless inspection of "hazardous waste" facilities and operations as opposed to "ordinary solid waste" facilities and operations. The majority concludes that three of Dewey's four "requirements" for validating warrantless inspections are satisfied by

the Act,[2] but that the fourth is not. Majority slip op. at 11, n. 8. The fourth requirement, that there be "reasonable legislative or administrative standards" governing the inspection, is not met, according to the majority, where "ordinary solid waste" is involved because:

> ordinary solid waste does not pose the same danger to public health as hazardous waste. Since the public interest is less vitally affected and the industry itself has

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[2]The majority concludes that the following Dewey requirements are satisfied by the Act: first, whether the business operator is on notice that he is engaged in activity which may subject him to warrantless searches; second, whether the regulation of the industry is pervasive and regular, considering the history of the regulatory scheme as a factor in this determination; third, whether there is a strong governmental interest in the search. Majority slip op. at 10-11.

> fewer of the special characteristics that would put an operator on notice of random regulatory searches, we believe that warrantless searches for ordinary solid waste cannot withstand constitutional scrutiny absent proper adoption by the Department of a flexible inspection schedule or a reasonable definition of the circumstances under which such searches will be conducted.

Majority slip op. at 16.

The majority's attempt to distinguish this case from "Colonnade-Biswell exception" cases because this case involves "ordinary solid waste" is unpersuasive, for two reasons.

First, the majority's factual assumption is wrong -- we do not know what kind of waste the Department of Environmental Resources' inspectors would have found on April 22, 1982, because the inspectors were not able to

take samples that day after they were ordered off the property by appellee. The DER was informed that a sludgy solid waste was being dumped on appellee's property, where a few months before some oily waste had been deposited. The inspectors had no way of knowing, therefore, whether the waste was "hazardous" or "non-hazardous," "residual," "agricultural," or "municipal" as those terms are defined in the Act. 35 P.S. § 6018.103. That was one of the critical reasons why inspection was so important. Moreover, the definitions of the various recognized types of waste are not mutually exclusive. "Hazardous waste" includes "sludge from an industrial or other waste water treatment plant" and "solid, liquid, semisolid or contained gaseous material resulting

from municipal, commercial, industrial, institutional, mining or agricultural operations," and "solid waste" includes "municipal, residual or hazardous wastes" of "solid, liquid, semisolid or contained gaseous materials." Id. The "affidavit for issuance of process" accompanying the criminal complaint in this matter states that the DER had received information that "material (presumably sewage sludge" had been dumped on appellee's property. "Sewage sludge" is certainly "solid waste" within the definition of that term, and could also be "hazardous waste" if, "because of its quantity, concentration, or physical, chemical or infections characteristics may: (1) cause or significantly contribute to an increase in mortality ...; or (2) pose a substantial present or potential hazard

to human health or the environment. 35 P.S. § 6018.103. Because of appellee's actions in refusing to allow DER inspectors to take samples on April 22, 1982, there is no way of knowing whether "sewage sludge" had in fact been dumped and, if so, whether it was "hazardous" or, as the majority phrases it, "ordinary solid waste."

The second flaw in the majority's distinction is that, even if there had only been non-hazardous, "ordinary solid waste" involved in this case, the legislature has determined that the risk to the public health, safety and welfare, and to the environment, posed by "improper and inadequate solid waste practices," both hazardous and non-hazardous, necessitates the warrantless inspection procedures authorized by the Act. Thus, the majority errs in

stating: "While we recognize an important public interest in controlling non-hazardous waste, it does not rise to the same level of concern as hazardous waste." Majority slip op. at 16. It is not for this Court to determine the "level of concern" for the problems and risks posed by "non-hazardous" waste, for the appropriate level of concern has been established by the legislature.

There is a strong and fundamental presumption that the legislature has acted within constitutional bounds. Commonwealth v. Zettlemoyer, 500 Pa. 16, 58-60, 454 A.2d 937, 959 (1983), cert. denied 461 U.S. 970 (1983); American Trucking Associations, Inc. v. Scheiner, ____ Pa. ____, 509 A.2d 838, 849 (1986); Commonwealth v. Mikulan, 504 Pa. 244, 247, 470 A.2d 1339, 1340 (1983). Consequently, one challenging

the constitutionality of a legislative enactment bears the heavy burden of demonstrating that it clearly, plainly and palpably violates some specific mandate or prohibition of the constitution. Id. Snider v. Thornburgh, 496 Pa. 159, 166, 436 A.2d 593, 596 (1981).

In considering the constitutionality of the Solid Waste Management Act, we must also bear in mind that it was enacted to implement the will of the people as expressed in Article I, section 27 of the Pennsylvania Constitution, which provides:

> **Natural resources and the public estate**
>
> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources

> are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Adopted May 18, 1971.

See section 102(10) of the Act, 35 P.S. § 6018.102(10) ("it is the purpose of this act to ... implement Article I, section 27 of the Pennsylvania Constitution. ...").

Viewed in that light, it is apparent that the legislature is very concerned about the problems and risks posed by both hazardous and non-hazardous ("ordinary") waste disposal and has subjected the disposal of all forms of solid waste to heavy regulation. The strong presumption of constitutionality that accompanies en-

vironmental legislation in this Commonwealth requires that we give great deference to the General Assembly's assessment of the dangers and risks posed by "improper and inadequate solid waste practices" regarding all forms of solid waste. Section 102 of the Act states:

> The Legislature hereby determines, declares and finds that, since improper and inadequate solid waste practices create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare, it is the purpose of this act to:
>
> (1) establish and maintain a cooperative State and local program of planning and technical and financial assistance for comprehensive solid waste management;

> (2) encourage the development of resource recovery as a means of managing solid waste, conserving resources, and supplying energy;
>
> (3) require permits for the operation of municipal and residual waste processing and disposal systems, licenses for the transportation of hazardous waste and permits for hazardous waste storage, treatment, and disposal;
>
> (4) protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes;
>
> (5) provide a flexible and effective means to implement and enforce the provisions of this act....

35 P.S. § 6018.102 (emphasis added).

While hazardous waste is subject to perhaps more stringent regulation, 35 P.S. §§ 6018.401-6018.405 (Article IV), so-called "ordinary solid waste" is subject to extensive and pervasive regulation as well. 35 P.S. §§ 6018.201-6018.203 (Article II. Municipal Waste) and §§ 6018.301-6018.303 (Article III. Residual Waste). Thus, as for "non-hazardous" or "ordinary" waste just as with "hazardous" waste, the legislature has determined that:

> The risks these substances pose to the public, coupled with the commercial operator's knowledge of those risks, justify warrantless searches of sites where they are kept. The nature of the business and its narrow definition justify the search as indicated when Dewey is compared to [Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)]. In short, such searches are a reasonable means of ameliorating the great risk these materials pose to the general public.

Majority op. at 15 (in reference to risks of hazardous waste only).

As this Court recently stated in Commonwealth v. Parker White Metal Co., ____ Pa. _____, ____ A.2d _____ (J-208-1985, filed, 1986):

> [The] presumption [of constitutionality] is further strengthened in this case by the explicit purpose of the Act to implement Article I, section 27 of the Pennsylvania Constitution, a remarkable docu-

> ment expressing our citizens' entitlement and "right to clean air, pure water, and -- to the preservation of the natural, scenic, historic and esthetic values of the environment." The courts of this Commonwealth, as part of a co-equal branch of government, serve as "trustees" of "Pennsylvania's public natural resources," no less than do the executive and legislative branches of government. As one of the trustees of the public estate and this Commonwealth's natural resources, we share the duty and obligation to protect and foster the environmental well-being of the Commonwealth of Pennsylvania. Failure to act with vigilence "so as best to achieve and effectuate the goals and purposes" of the Solid Waste Management Act would be detrimental to the public health, safety and welfare, and would be a breach of the public trust.

For the foregoing reasons, I would uphold the validity of section 608 of

the Act and its authorization of warrantless inspections of appellee's property in this case.

Mr. Justice McDermott and
Mr. Justice Papadakos join
this dissenting opinion.

IN THE COURT OF COMMON PLEAS
OF
WESTMORELAND COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
versus	)	NO. 1222 C 1982
CHARLES E. LUTZ	)	

OPINION

This matter is before the Court on an Omnibus Pretrial Motion to Suppress Certain Evidence and to Dismiss Certain Counts of the Information.

On April 22, 1982 two employees of the Pennsylvania Department of Environmental Resources (DER) entered the Defendant's farm, without his permission and without a warrant, and began to take soil samples from his property The agents had been notified by an anonymous informant that Defendant was dumping,

or permitting the dumping of, solid waste on his property without a permit from DER. Defendant confronted the two agents, and in the course of an altercation grabbed a camera from one of the agents and knocked a sample bottle from his hands onto the ground. He then ordered them from his property, and they complied, only to return the next day, after obtaining the Defendant's permission, through his attorney Defendant is charged with violating 35 P.S. 6018.610(1) by dumping or permitting the dumping of solid waste without a permit; violating 35 P.S. 6018.610(7) by refusing, hindering, obstructing, delaying, or threatening any agent or employee of the Department in the course of performance of any duty under the Act, including, but not limited to entry and inspection under any circumstances;

and violating 18 Pa. C.S.A. Section 5101 by obstructing the administration of law or other governmental function The Defendant's Motion to Dismiss is directed only to the charge of hindering or obstructing agents of the DER and obstructing the administration of law or other governmental function.

The hearing established that the DER agents had not taken any samples from the Defendant's property, and the Motion to Suppress them, is therefore, moot.

The evidence presents two issues: (1) Does DER have the right to enter land without either a warrant or the permission of the landowners? (a) If no such right exists, and the landowner interferes with DER agents while they are on his land, does such conduct of the landowner constitute the offense proscribed by 35 P.S. 6018.610 (7)?

With regard to the first question, 35 P.S. 6018.608(3) clearly gives DER the right to "enter any building, property, premises or place where solid waste is generated, stored, processed, treated or disposed of for the purpose of making such investigation or inspection. . .". The question really becomes, therefore, whether this Section comports with the requirements of the Fourth Amendment to the United States Constitution. In determining the constitutional validity of this Section, it is interesting to note that the following section, Section 6018.609, provides that an agent or employee of DER may apply for a search warrant for the purpose of inspecting or examining any property, and further sets forth the criteria which will establish "sufficient probable cause" for the issuance of the warrant.

In Frank v. Maryland, 359 U.S. 360, 3 L.Ed.2d 877, 79 S.Ct. 804, the Supreme Court upheld a state court conviction of a homeowner who refused to permit a municipal health inspector to enter and inspect his premises without a search warrant. The Frank case was expressly overruled in Camara v. Municipal Court, 387 U.S. 523, 18 L. Ed,2d 930, 87 S.Ct. 1727 (1967). In Camara the defendant was charged with violating a city housing code by refusing to permit a warrantless inspection of his residence, and the Supreme Court, in holding that the owner was justified in refusing to permit the warrantless inspection, stated:

> "In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by

> the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual. . .".

It is true, as the Commonwealth points out, that there are exceptions to this Rule. Thus, where the business is a "pervasively regulated one" such as the manufacture and sale of liquor or firearms, the Court has reasoned that when an entrepreneur embarks upon one of these businesses, he has voluntarily chosen to subject himself to the "full arsenal of governmental regulation". Marshall v. Barlows, Inc., 436 U.S. 307, at page 312.

If the Defendant here were in possession of a DER permit for the dumping and storage of solid waste, this Court might have no difficulty in finding that

he voluntarily brought himself within the ambit of the above exception and that he voluntarily consented to the warrantless search procedures set forth in the Act. However, the evidence showed that the Defendant did not have a permitl, and in fact he is charged with dumping solid waste without such a permit,[1] and in fact he is charged with dumping solid waste without such a permit.

Since the agents of the Commonwealth arrived at the scene of Mr.

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[1]The Commonwealth failed to introduce the "written consent of the landowner to entry upon any land" required in an application for a permit required under 35 Pa. C.S.A. 6018.502(b). Consequently, this Court need not determine when such "consent" takes effect: Upon filing the application or issuance of the permit?

Lutz's property without a warrant and without any articulated probable cause prior to their entry upon his land[2] (there being absolutely no showing as the reliability of their unnamed informant nor the basis upon which the unnamed informant made his allegation), the Court must make a hindsight determination of whether, at the time of their initial entry upon the land of the Defendant, the Defendant had a right "in being free from unreasonable intrusions on to his property by agents of the government."? Donovan v. Dewey, 452 U.S. 594, 69 L.Ed.2d 262 at 269, 101 S.Ct. 2534 (1981) The two main routes of

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[2]No claim was made by the DER agents of any emergency or "exigent" circumstances. In fact, arrangements were subsequently made through legal counsel for an inspection.

analysis are thus: (I) If the government agents were legally upon the land pursuant to a constitutional statute, then there was no "unlawful entry or other trespass upon land". They could validly make a visual inspection and seize evidence and contraband, and any interference therewith would constitute a crime. (II) If the Statute which authorized their initial entry upon the land were unconstitutional, a further analysis must be made to see whether the entry was reasonable such as to prevent their entry from being "unlawful". It is true that a statute may authorize a warrantless search of a limited area whenever the Defendant has already voluntarily submitted himself to a licensing requirement. See, United States v. Biswell, 406 U.S. 311, 32

L.Ed. 2d 87, 92 S. Ct. 1593 (1972). However, since Mr. Lutz had not yet obtained a license and since the Statute does not palpably convey upon the Commonwealth a right to make warrantless searches incident to a determination of whether or not a license should be issued, then the Court must perform a basic Fourth Amendment analysis.

> "Our prior cases have established that the Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property. Marshall v. Barlows, Inc. 436 U.S. 307, 56 L.Ed. 2d 305, 98 S.Ct. 1816 (1978); See v. The City of Seattle, 387 U.S. 541, 18 L.Ed. 2d 943, 87 S.Ct. 1737 (1967). However, unlike searches of private homes, which generally must be conducted pursuant to a warrant in order to be reasonable under the Fourth Amendment, legislative schemes authorizing warrantless admin-

> istrative searches of commercial property do not necessarily violate the Fourth Amendment. . .the greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspection.

Donovan v. Dewey, supra, 452 U.S. at 598-599, 69 L.Ed. 2d at page 238-269. Initially, the Supreme Court appeared to mandate a blanket requirement strictly following the Fourth Amendment requirements where a statute did not authorize forcible warrantless entries but made refusal an offense:

> "Where Congress has authorized inspections but

> made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." Colonnade Catering Corp. v. United States, 397 U.S. 72, 25 L.Ed. 2d 60 at page 64, 90 S.C.T. 774 (1970).

Additionally in the situation of a locked commercial warehouse, there can be no forcible entry as part of a routine, periodic city wide canvas to obtain compliance with a fire code without a warrant and probable cause to believe that a violation existed. See v. Seattle, 387 U.S. 541, 18 L.Ed. 2d 943. Since the instant case does not deal with a private residence as in Camara, nor with a locked commercial room as in Colonnade and See, there is no absolute requirement for the prior issuance of a search warrant; instead this Court must make a detailed analysis of the Statute upon which the agents base their authority for entering.

> "Whether the secretary proceeds to secure a warrant or other process, with or without prior notice, his entitlement to inspect will not depend upon his demonstrating probable cause to believe that conditions in violations of OSHA exist on the premises Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an... inspection are satisfied with respect to a particular (establishment)." Camara v. Municipal Court, 387 U.S., at 538, 18 L. Ed. 2d 930, 87 S.Ct. 1727. Marshall v. Barlows, Inc., 436 U.S. 307 at 320-321, 56 L.Ed. 2d at 316.

The Supreme Court has further defined what is necessary for "reasonable legislative or administrative standards". In a case in which a

Federal mine inspector attempted to inspect the premises of an open stone quarry under authority of the Federal Mine Safety and Health Act of 1977 (30 U.S. C.S. §813(a)), which provided that Federal mine inspectors are to inspect all mines at set intervals to insure compliance with health and safety standards and to make follow up inspections to determine if violations have been corrected and to do so without first obtaining a warrant, the Secretary of Labor, after the inspector was refused admission, was granted an injunction enjoining the quarry operator from refusing to permit the warrantless search The Court found that the statutory scheme did not violate the Fourth Amendment prohibition against unreasonable searches because there was a substantial federal interest in the

enforcement of the Act, in improving the health and safety conditions in the nation's mines, which interest would be significantly frustrated by a warrant requirement, and the Act's inspection program, in terms of the certainty and regularity of its application, provided a constitutionally adequate substitute for warrant for three reasons" (1) That Act clearly notified the operator that inspections would be performed on a regular basis; (2) That Act and regulations issued thereunder informed the operator what health and safety standards must be met and thus curtailed the discretion of government officials to determine what facilities to search and what violations to search for; and (3) That Act prohibited forceful entries, instead requiring the Secretary, when

refused entry onto a mining facility, to file a civil action in Federal Court to obtain an injunction against future refusals embodied a means by which any special Fourth Amendment interests could be accommodated Donovan v. Dewey, supra.

This Court finds that the warrantless search and seizure provisions of the Pennsylvania "Solid Waste Management Act, specifically 35 Pa. C.S.A. §6018.608 do not meet constitutional requirements. Even if we assume that Pennsylvania interests in protecting the health and safety of the Commonwealth from untreated sewage, etc are just as great as the Federal interest in protecting the health and safety of the mine workers, this Statute is so broad as to its application and so indefinite as to the certainty or regularity of its

inspections that any search conducted thereunder without probable cause does not meet Federal constitutional requirements. The agents have authority to "enter any building, property, premises or place where solid waste is generated, stored, processed treated or disposed of for the purposes of making such investigation or inspection as may be necessary to acertain the compliance or non-compliance by any rules or municipality with provisions of this Act and the rules or regulations promulgated hereunder. 35 Pa. C.S.A. §6018.608(3). Although the Statute does provide for an expanded definition of probable cause for the issuance of a search warrant, 35 Pa. C.S.A. §018.609, it does not first require the agent to apply for the search warrant Moreover, the warrantless

entry provisions do not alert an operator that inspections would be performed on a regular basis as required by the first Donovan test nor place any limitation upon areas to be searched nor contain any prohibition against forcible entries as required by the third Donovan criterion. Thus, this Court must find that §608(3) of the Pennsylvania Act is unconstitutional as applied to the facts of this case.

However, that does not end the case nor our analysis. If the untreated sludge were in plain view while the agents were walking on a public roadway and it could be determined to be sludge from that vantage point, then there would be a "plain view" exception to the requirement for a warrant on probable cause to enter and seize the evidence.

If that were so, the agents would then have a legal right to be on the farm land and Defendant would have no right to raise a defense under Section 507(a)(1) of the Crimes Code. (Protection of Property). However, the facts elicited at the pre-trial hearing indicate that the agents did not know from their own personal knowledge that there was sludge present until they were actually walking upon the open field and were off the public highway Since the sludge was not "in plain view"[3] from the road, the Court must then make the determination whether or not the property owner has a protected expecta-

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[3]Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971) Given Katz, the "open field" of Hester v. U.S., 265 U.S. 57 (1924) is of doubtful vitality; in any event, the DER did not actually see Lutz pouring sludge onto the field, the criminal act. The Hester agents did see the sale of illegal alcohol in the "open field"

tion of privacy as required by the United States Supreme Court decision in Katz v. United States, 389 U.S. 347 (1967) wherein the Court rejected the notion of "constitutionally protected areas" and instead required a determination of whether the police conduct violated a privacy expectation upon which the Defendant could justifiably rely. If there is such a justifiable expectation of privacy, then the agents were not legally on the land and the Defendant has a right to reasonably protect his property in ordering the agents off and in taking back the sample of sludge. However, if there were no expectation of privacy, then the agents were not trespassers and were legally on the land, then the sludge could be in plain view and they would have the right to seize it and consequently Defendant

would have no right to interfere with its seizure. The testimony showed that the land was posted with "no trespassing" signs, was fenced, access was restricted, and the field in question was some distance from a public highway. The field was also in close proximity to the Defendant's residence. This Court, therefore, finds that he had a justifiable expectation of privacy, and the entry by DER agents, without a warrant, was without right, ab initio.

Consequently, this Court holds that the Fourth Amendment to the United States Constitution bars prosecution by a landower under 35 Pa. C.S.A. §6018.610(7) and 18 Pa. C.S.A. 5101 for refusing entry and hindering investigation under the circumstances of this case, particularly where a warrant

could so easily have been obtained. (This Court notes the relaxed standards for probable cause for a warrant under this Act). This is not to say that one in defendant's position may use force against the agents Commonwealth v. Whitier, 241 Pa. Super 316 (1976) allows prosecution for an assault where a landowner assaulted the law enforcement officials, but the defendant here is not charged with assault (nor does the evidence show that he assaulted them).

Dated: April 29, 1983.

IN THE COURT OF COMMON PLEAS
OF
WESTMORELAND COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
vs.	)	NO. C-128082
CHARLES E. LUTZ	)	

OMNIBUS PRETRIAL MOTION

AND NOW, comes the Defendant, Charles E. Lutz, and by his attorneys, Elash, Miller and DePasquale, brings this Motion upon cause of which the following is a statement:

A. Motion to Suppress Evidence

1. On April 22, 1982 in Jeanette, Westmoreland County, Pennsylvania an altercation arose between Defendant and two employees of the Pennsylvania

Department of Environmental Resources (DER): Randall K. Walton and Rita Coleman.

2. The altercation occurred on the working farm property of Defendant.

3. As a result of the altercation, Defendant was charged at the above-captioned as follows: (1) Hindering and/or Obstructing Agents of the DER; (2) Unlawful Dumping of Solid Waste; (3) Obstructing the Administration of Law or Other Governmental Function.

4. On the date and at the place in question the DER employees took soil samples. These were taken on private property upon which the DER employees trespassed, without a search warrant and without Defendant's consent.

5. Said samples were taken illegally and in violation of Defendant's

IV and XIV Amendment rights under the United States Constitution.

WHEREFORE, Defendant prays this Honorable Court to suppress the samples in question and prohibit their introduction as evidence against Defendant at trial.

B. Motion to Dismiss Counts I and III

6. Defendant hereby incorporates paragraphs 1 through 5 above as if the same were more fully set forth herein.

7. The DER employees were trespassers and not in the legal course of State business when the altercations in question occurred.

8. Thus Defendant did not hinder or obstruct lawful business of DER employees nor did he obstruct the administration of law or other government business.

WHEREFORE, Defendant prays this Honorable Court to dismiss Counts I and III of Defendant's indictment.

Respectfully Submitted,

BY s/s James E. DePasquale
James E. DePasquale
Elash, Miller and DePasquale

Supreme Court, U.S.
FILED
FEB 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-997

In The
Supreme Court of the United States
October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

CHARLES E. LUTZ,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

George A. Miller, Esquire
James E. DePasquale, Esquire
Feczko & Seymour
Professional Office Building
430 Boulevard of the Allies
Pittsburgh, PA 15219
(412) 261-4970
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

5PP

QUESTIONS PRESENTED

1. Whether outdoor business areas are "open fields" within the meaning of the Fourth Amendment?

2. Whether the warrantless search of Respondent's pasture violated the Fourth Amendment because governmental agents made physical entry into it?

3. Whether the issue of the good faith of the state agents is waived due to the failure of Petitioner to raise the same below?

PARTIES TO THE PROCEEDING

Petitioner is the Commonwealth of Pennsylvania.

Respondent is Charles E. Lutz.

TABLE OF AUTHORITIES

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CASES

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Walters v. City of St. Louis, Mo., 347 U.S. 231, 74 S. Ct. 505 (1954) 3

OTHER AUTHORITIES

28 U.S.C. 1257(3) 1

Fourth Amendment, U.S. Constitution 1

Supreme Court Rule No. 17(1) 2

OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania dated October 17, 1986, whose judgment herein is sought to be reviewed, is reported at *Commonwealth of Pennsylvania v. Lutz,* — Pa. —, 516 A.2d 339 (1986) and reproduced at Appendix A of Petition For Writ of *Certiorari.* The prior decision of the Court of Common Pleas of Westmoreland County, Pennsylvania is unreported but may be found at Appendix B of Petition For Writ of *Certiorari.*

—o—

JURISDICTION

The Judgment of the Supreme Court of the Commonwealth of Pennsylvania was entered on October 17, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

—o—

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment of the United States Constitution, which provides as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, will not be violated, and no Warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

—o—

STATEMENT OF THE CASE

A. Procedural History

Respondent accepts (for its present purposes) the Procedural History recited in the Petition For Writ of *Certiorari* of Petitioner.

B. The Evidence

Respondent accepts for its present purposes the Evidence recited in the Petition For Writ of *Certiorari*.

C. Rulings Below

Respondent accepts for its present purposes the Rulings Below recited in the Petition For Writ of *Certiorari*.

———o———

REASONS FOR NOT GRANTING THE REVIEW

Respondent hereby relies upon the able Opinion of the Supreme Court of Pennsylvania in opposing this review. See *Commonwealth of Pennsylvania v. Lutz*, — Pa. —, 516 A.2d 339 (1986), and reproduced at Appendix A of the Petition For Writ of *Certiorari* of Petitioner. Respondent further argues that Petitioner seeks to have this Honorable Court review a decision from the Pennsylvania Supreme Court, a state court of last resort, which: (1) is not in conflict with a decision of any federal court of appeals, or any other state court of last resort; (2) is not in conflict with applicable decisions of this Honorable Court; and (3) does not present a question of federal law which must be settled by this Honorable Court. See Rules of the Supreme Court No. 17(1).

Finally, Petitioner now raises for the first time the good faith of state agents in relying upon the warrantless search provisions of a statute which heretofore had never been declared unconstitutional. This issue, not having been raised at the level of the state court, is now forever waived. *U.S. v. New York Tel Co.*, 326 U.S. 638, 66 S. Ct. 393 (1946); *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 74 S. Ct. 505 (1954).

CONCLUSION

WHEREFORE, Respondent respectfully prays that a Writ of Certiorari be denied.

Respectfully submitted,

FECZKO & SEYMOUR
GEORGE A. MILLER, ESQUIRE
JAMES E. DEPASQUALE, ESQUIRE
Professional Office Building
430 Boulevard of the Allies
Pittsburgh, PA 15219
(412) 261-4970

Attorneys for Respondent

Supreme Court, U.S.
FILED
JOSEPH F. SPANIOL, JR.

No. 86-997

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

CHARLES E. LUTZ,
Respondent

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

LeRoy S. Zimmerman
Attorney General

Charles P. Mackin, Jr.
Chief Deputy Attorney General

Keith Welks
Chief Deputy Attorney General

Office of Attorney General
Criminal Law Division
1600 Strawberry Square
Harrisburg, PA 17120
(717)787-2100

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

On December 16, 1986, your Petitioner, the Commonwealth of Pennsylvania, filed a Petition for Writ of Certiorari to the Supreme Court of Pennsylvania with this Honorable Court. On or about February 18, 1987, Respondent filed his Brief in Opposition. In said Brief, Respondent contends, inter alia, that your Petitioner raised for the first time in its Petition to this Honorable Court the issue of good faith reliance upon the warrantless search provision of a statute which heretofore had never been declared unconstitutional, and, therefore, according to Respondent, this issue is forever waived.

Your Petitioner submits that Respondent is mistaken. In its Brief

before the Supreme Court of Pennsylvania, Petitioner raised the very argument about which Respondent now complains. (An excerpt of pages 33-34 wherein this matter was addressed in Petitioner's Brief to the Pennsylvania Supreme Court is attached hereto and made a part hereof.) At that time, the issue was whether or not the accused, Charles E. Lutz, Respondent herein, had interfered with the performance of duty of certain Department of Environmental Resources (DER) employees. Respondent Lutz claimed that the DER employees had trespassed onto his land and therefore were outside the course of their duties and that his subsequent resort to self-help did not amount to interfering with a legitimate governmental function. At that time, your Petitioner contended, inter alia, that the DER employees, in addition to acting pursuant to the open

fields doctrine, had the right to rely upon the warrantless entry provision of the Solid Waste Management Act in Pennsylvania, Act of July 7, 1980, P.L. 380, 35 P.S. §§ 6018.101 et seq.. As set forth in its Brief, that portion of the Act had never, to your Petitioner's knowledge, been declared unconstitutional; nor had it even been challenged on constitutional grounds. Therefore, your Petitioner contended, the DER employees were legitimately on Respondent's property, for they had, in good faith, relied on a constitutionally enacted statute which was still valid at the time they made their entry.

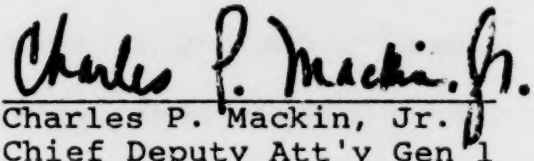
Accordingly, Petitioner has properly asserted and preserved the issue of good faith reliance in the proceedings below. It is not estopped from pressing that contention in this Honorable Court.

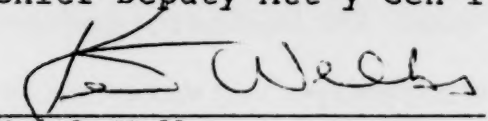
CONCLUSION

WHEREFORE, your Petitioner prays that the requested Petition for Writ of Certiorari to the Supreme Court of Pennsylvania be granted.

Respectfully submitted,

LeRoy S. Zimmerman
Attorney General

By: 
Charles P. Mackin, Jr.
Chief Deputy Att'y Gen'l

By: 
Keith Welks
Chief Deputy Att'y Gen'l

Criminal Law Division
1600 Strawberry Square
Harrisburg, PA 17120
(717)787-2100

EXCERPT FROM PAGES 33-34 OF PETITIONER'S BRIEF BEFORE THE SUPREME COURT OF PENNSYLVANIA

Long has it been held that legislative enactments are presumed valid until declared otherwise. Simco Sales of Pa., Inc. v. Township of Lower Merion, 38 Pa. Commonwealth Ct. 434, 394 A.2d 642 (1978); Lutz v. Armour, 395 Pa. 576, 151 A.2d 108 (1959). To the Commonwealth's knowledge, the statute under consideration has never before been declared unconstitutional.

Thus, Walton and Coleman, the two DER agents, had every right to act in performance of their duties under § 6018.608 of the Act without being subject to Lutz's physical interference therewith.

PROOF OF SERVICE

I hereby certify that I served the foregoing document upon the persons and in the manner indicated below:

Service by first class mail, postage pre-paid, on Tuesday, March 3, 1987, addressed as follows:

George A. Miller, Esq.
James E. DePasquale, Esq.
FECZKO & SEYMOUR
Professional Office Building
430 Boulevard of the Allies
Pittsburgh, PA 15219

Charles P. Mackin, Jr.